No. 92-1964

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
HEALTH CARE AND RETIREMENT CORPORATION OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals correctly determined that licensed practical nurses who have authority to "assign" and "responsibly to direct" subordinate employees in a nursing home are acting "in the interest of the employer" and are therefore "supervisors" within the meaning of Section 2(11) of the National Labor Relations Act, 29 U.S.C. 152(11).*

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* The Rule 29.1 statement filed by respondent in its brief in opposition to the petition for certiorari remains current.

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STATUTORY PROVISIONS INVOLVED

The relevant statutes are set forth in the brief of petitioner.

STATEMENT OF THE CASE

On May 25, 1989, the National Labor Relations Board ("Board") issued a complaint alleging that respondent, Health Care and Retirement Corporation of America ("HCR"), committed unfair labor practices under Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 151, *et seq.* ("NLRA" or "Act"). The complaint charged that respondent improperly disciplined four licensed practical nurses employed at one of its nursing homes for engaging in concerted activity. Pet. App. 2a. Respondent has maintained from the outset that the discipline was imposed for legitimate reasons unrelated to any activity arguably protected by the Act. *Id.* There is no dispute, however, that the NLRA would not prohibit

respondent from disciplining these nurses for the conduct alleged if they were "supervisors," as defined by the Act. 29 U.S.C. 152(11). The record evidence, and the court of appeals' decision, fully support dismissal of the General Counsel's complaint on this ground.

A. Record Evidence Concerning the Supervisory Activities of Licensed Practical Nurses Employed by Respondent

The licensed practical nurses who were allegedly disciplined in violation of the Act were employed at Heartland of Urbana ("Heartland").[1] Heartland is a 100 bed, long-term care nursing facility owned and operated by HCR in Urbana, Ohio. The facility provides skilled nursing care to its residents who are elderly, infirm, and need assistance with their daily living activities. Pet. App. 34a-35a. Evidence concerning HCR's organizational structure, as well as the responsibilities assigned to the nurses, readily demonstrates that HCR relies upon its licensed practical nurses to supervise the nurse aides ("aides") who are employed at the facility.

1. As the ALJ acknowledged, HCR's organizational structure suggests that the staff nurses are supervisors. Pet. App. 46a-47a. The Director of Nursing ("DON") has overall responsibility for the nursing department.[2] There is an Assistant Director of Nursing ("ADON"), a treatment nurse, and a patient assessment nurse. Pet. App. 34a-35a. The balance of the staff fluctuates from 9 to 11 registered and licensed practical "staff" nurses and approximately 50-55 nurse aides. *Id.* at 35a.

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[1] Petitioner concedes (Pet. Br. at 27 n.14) that these nurses are not professional employees. The Board has consistently held that licensed practical nurses are not professional employees under Section 2(12). National Labor Relations Board, *Thirty-Eighth Annual Report* at 66-67 (1973).

[2] The DON, like all other department heads, reports directly to the Administrator, who is the senior management official at the facility. Pet. App. 34a.

Heartland is divided into two wings, and each wing has approximately 50 beds and one nurses' station. The facility operates 24 hours per day in three shifts. On the day shift, each wing is staffed with one staff nurse and six aides. Pet. App. 37a; Jt. App. 62-63. The DON and ADON also work days during the week.[3] On the evening shift, each wing has one staff nurse and four aides. *Id.* On the night shift, there is one staff nurse on each wing, with five aides working both wings. Pet. App. 37a; Jt. App. 63. Neither the DON nor the ADON are regularly at the facility after 5:00 p.m. and neither one regularly works on weekends. Pet. App. 46a; Jt. App. 4. Thus, the staff nurses are the most senior ranking employees at the facility after 5:00 during the week, and at all times on the weekends—approximately 75% of the time. Pet. App. 46a-47a.

Aides are non-licensed personnel who provide basic care to the residents. Pet. App. 36a; Jt. App. 61. The aides' work is not technical. It includes lifting, turning and helping to mobilize the residents. It also includes assisting the residents with daily necessities such as eating, bathing, dressing and grooming. *Id.*; Jt. App. 35, 54, 61. The aides report directly to the staff nurse on duty. Pet. App. 38a; Jt. App. 61. If the staff nurses are not supervisors, the DON is the sole supervisor for some 60-70 nursing department employees.[4] As the Administrative Law Judge noted, it is not reasonable to infer that

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[3] The DON and the ADON usually work from 7:00 a.m. to 4:00 or 4:30 p.m., Monday through Friday. Pet. App. 46a. The staff nurses work twelve hour shifts beginning at either 7:00 a.m. or 7:00 p.m. *Id.* at 37a. Aides work eight hour shifts beginning at 7:00 a.m., 3:00 p.m. or 11:00 p.m. *Id.* In June of 1989, staff nurses began working three shifts per day, rather than just two. Jt. App. 63. The ALJ considered the nurses' status, however, during the period of January through mid-March of 1989. Pet. App. 34a, 37a.

[4] The ADON is a supervisor, but does not actively supervise aides. Neither the aides nor the nurses considered the ADON to be *their* supervisor. Jt. App. 52; Transcript of hearing before the ALJ ("Tr.") at 42, 154.

respondent would structure its operations with a 30:1 ratio of employees to supervisors. Pet. App. 47a-48a.

2. The duties conferred on the staff nurses are also indicative of supervisory status. The staff nurses perform a variety of functions, because, as the ALJ stated, "by and large it is the responsibility of Heartland's nurses to ensure that the needs of the residents are met." Pet. App. 36a. Respondent trains the staff nurses to supervise the aides, and gives the staff nurses the authority and responsibility to manage operations and direct the aides assigned to their wing.[5]

a. HCR's job description, training program, and compensation levels are all indicative of the staff nurses' supervisory status. The job description provides that staff nurses are responsible for the overall management and supervision of their units. Resp. Ex. 1; Jt. App. 122-25. Staff nurses must possess a "demonstrated ability to manage and supervise a nursing unit" and the "ability to make independent decisions." *Id.*[6] To assist them in performing their supervisory duties, HCR provides mandatory supervisory training for staff nurses. Staff nurses are trained to oversee the work of aides, to evaluate the aides' performance, and to communicate effectively with them. Jt. App. 109-10, 113-15. Aides do not receive this training. The licensed practical nurses are also compensated at the benefit tier reserved for supervisors, department heads, and other professionals. Tr. 1599.

b. The Administrative Law Judge acknowledged that the staff nurses have "authority over" and "responsibili-

[5] In addition to supervising the aides, staff nurses have responsibility for dealing with physicians and families. Resp. Ex. 1; Jt. App. 122-25.

[6] The description states that staff nurses are required to assist the DON with supervision; participate in the orientation and instruction of nurses' aides; assign designated patient care activities to the aides; appraise the aides' performance and keep notes for this purpose; and share the notes with the DON. *Id.* Each LPN is given a copy of the job description. Resp. Exs. 8, 13, 15, 19.

ties regarding" the aides. Pet. App. 37a. The scope of that authority includes responsibility to ensure adequate staffing; to make daily work assignments; to monitor the aides' work to ensure proper performance; to counsel and discipline aides; to resolve aides' problems and grievances; to evaluate aides' performance; and to report to management.

Ensuring Adequate Staffing. As the ALJ noted, when aides do not report to work, the staff nurse on duty must find replacements. Pet. App. 41a; Jt. App. 7, 106. The staff nurse may fill the vacancies by calling off-duty aides or asking aides to work an extra shift and approving overtime pay for that purpose. Pet. App. 41a-42a; Jt. App. 7, 69-70, 106. When staffing is short, staff nurses often reassign aides from one wing to the other so that each wing has a sufficient work force. Pet. App. 37a; Jt. App. 84-85. Staff nurses also approve requests for a temporary change in work days, or "shift swaps." Jt. App. 55-56, 73-74. Further, staff nurses are responsible for approving aides' requests to leave work early (Tr. 1054, 1190, 1275), and must assign or approve the aides' break and lunch periods. Pet. App. 40a; Jt. App. 36-37.

Assigning Work to Aides. Although the DON assigns the aides to a particular shift, the staff nurses direct the aides' day-to-day assignments, and "tell each aide which residents the aide is to care for." Pet. App. 38a; Jt. App. 5, 65. Aides are not assigned to the same residents every day. Any change in the number of residents, their needs, or the availability of the aides for work requires the staff nurse to adjust the assignments by reassigning aides to different residents or job duties. Jt. App. 30-31, 99-100.[7] The nurses' goal in making job assignments is to be fair to the aides and to ensure that residents receive proper care. Jt. App. 85-87. The fair distribution of

[7] The residents' needs are influenced by factors such as the residents' weight, continence level, ability to ambulate, ability to control movements, ability to feed themselves, and their general medical condition. Pet. App. 38a, 36a.

work affects the aides' working conditions and morale. Jt. App. 30-31. The ALJ accordingly observed that staff nurses "have the authority to vary the aides' assignments in ways that can make a difference to the aides"; that they are "expected to exercise judgment in exercising that authority"; and that "the way nurses divide up the work among the aides (on the daytime or evening shifts) can have a considerable impact on how hard each of the aides has to work." Pet. App. 39a.[8]

Monitoring Work and Discipline. The staff nurses have the authority and responsibility to monitor the quality of the aides' work. The ALJ observed that, "[i]t is clear that the nurses have the authority to criticize an aide for improperly performing a task [and] to tell an aide to redo a task inadequately done." *Id.* at 40a. Moreover, the ALJ agreed that "every Heartland nurse routinely speaks to an aide whenever the nurse sees the aide failing to perform a task or performing it improperly." *Id.* at 43a. When performance problems arise, the staff nurse may choose to use a counseling form. *Id.* at 43a-44a. The ALJ noted that such forms have been used to report and to correct a wide range of performance problems. *Id.* (citing forms describing an aide as being " 'too bossy,' improperly passing work off onto other aides, not working fast enough, and 'not positioning patients properly.' ") Staff nurses also have authority to issue disciplinary warnings.[9] Jt. App. 75-77. If the infraction is minor, the nurse may choose simply to talk to the aide about it, or provide a verbal warning. Jt. App. 10-11, 29, 45-47; Tr. 103, 188, 1187. For more serious infrac-

[8] The day shift staff nurses spend considerable time preparing the aides' job assignments. The assignments sometimes take 2-3 hours to complete. Jt. App. 85. Some nurses work on the job assignment sheets at home. Jt. App. 35; Tr. 978.

[9] Staff nurses are also authorized to terminate aides for abusing residents, subject to review by the DON or Administrator. Tr. 1294-95.

tions, the staff nurse has authority to issue a written warning.[10]

Addressing Aides' Grievances and Complaints. Staff nurses have the authority and the responsibility to address the aides' grievances and complaints. Tr. 410.[11] If the staff nurse does not successfully resolve the grievance by informally discussing it with the aide and other employees, it is reported to the DON. Tr. 81, 410, 419, 1265-66. The DON confers with the staff nurse and makes an assessment. In most cases, the DON refers the matter back to the staff nurse to implement the resolution. Tr. 244, 433.[12]

[10] Formal written warnings are used to discipline an aide for such things as absenteeism, lateness, misconduct, or work refusal. Jt. App. 76-77; Resp. Exs. 2, 23. For example, a staff nurse counseled and issued a warning to an aide for being abrupt with a resident (Resp. Ex. 23). A less formal counseling form is often used when the infraction is not considered serious. Jt. App. 76-77, 93-94; Tr. 1198; G.C. Ex. 5, 39; Resp. Ex. 18, 23. For example, staff nurse Wells corrected an employee for not properly turning residents over and not doing her share of the workload. Resp. Ex. 18; Tr. 1208-09. Wells explained to the aide that she needed to do her job with more accuracy and speed. *Id.* The aide responded in writing on the counseling form, acknowledging Wells' warning that additional write-ups could lead to termination. Resp. Ex. 18.

[11] Staff nurse Clore testified that on more than one occasion she had to deal with conflicts among the aides. Jt. App. 108. When several aides complained that another aide on duty had an offensive body odor, Clore spoke with the aide and resolved the problem. Jt. App. 108-109. Clore resolved some disputes by calling an impromptu meeting and advising the aides that "this is the way things are going to be done." Jt. App. 109.

[12] For example, a number of aides complained to the DON that an aide, Stanhope, was not doing her work properly, was not doing her share of the work, and was directing the work of other aides. Jt. App. 58; G.C. Ex. 4. The DON referred the matter to the staff nurse in charge of that wing. The staff nurse spoke with Stanhope about the problem (Jt. App. 58), and followed up with a written statement of the incident. G.C. Ex. 4.

Job Evaluations. The staff nurses evaluate the aides' performance at the end of the aides' ninety day probationary period and annually. The evaluations are in writing, and are used to determine whether the aide should be retained as an employee. Pet. App. 45a; Jt. App. 127.[13] The annual performance appraisal form calls for evaluating the aides in the areas of human relations, attitude toward work, punctuality, personal appearance, job capability, development, and patient care. Resp. Ex. 3; Jt. App. 77-78, 127. The staff nurses fill out and sign the annual evaluation form. Pet. App. 45a.[14] The staff nurses take their performance appraisal role seriously, recognizing the importance of providing constructive feedback to aides. Tr. 196-97; Jt. App. 39-44. The aides review, comment on, and sign the performance appraisals. Jt. App. 78, 92-93. The evaluations are then reviewed and signed by the DON, and are kept in the aides' permanent personnel file. Tr. 912.[15]

Reports to Management. The staff nurses regularly report their activities to management. The ALJ in fact observed that "[n]urses routinely report problems about an aide's work or attendance to Heartland's administrator or D.O.N." Pet. App. 44a. Moreover, the ALJ acknowledged that "[s]ometimes those reports have major consequences for an aide—as in the aide being fired or being advised that any further occurrence will result in dis-

[13] *See* G.C. Exs. 8, 9; Resp. Exs. 23, 4, 10, 11; Jt. App. 19, 89-40.

[14] The staff nurses do not complete the form for punctuality and personal appearance. Resp. Ex. 3; Tr. 1016. Attendance is evaluated based on payroll records maintained in the business office. Jt. App. 39-40, 91-92. Some staff nurses do not complete the section entitled "Overall Evaluation," but some nurses do complete it. Jt. App. 40.

[15] Because aides cannot be promoted to a staff nurse position without first having satisfied the educational requirements to be an RN or an LPN, performance appraisals are not used for promotion. Resp. Ex. 12; Tr. 438, 1302. Pay increases are generally based on seniority (G.C. Ex. 10B; Tr. 915), but on at least one occasion, a staff nurse was not given an annual pay increase because of a poor performance evaluation. Tr. 916.

charge," and that "sometimes the nurse sits in on the conference between the administrator or D.O.N. and the aide [when] the aide is advised of that action." *Id.*

B. The Decision of the Administrative Law Judge

The ALJ resolved the threshold issue of the nurses' supervisory status against HCR. The ALJ nevertheless determined that HCR had not committed an unfair labor practice by discharging the nurses, and that, with one exception, HCR also had legitimate reasons for issuing written warnings to the nurses. Pet. App. 63a, 64a.

1. With respect to the supervisory issue, the ALJ found that "[i]t is clear that in common parlance Heartland's nurses are 'supervisors' " because "[t]hey give orders (of certain kinds) to the aides, . . . the aides follow those orders," and "the nurse on duty is in charge of the wing of the facility" "[i]n a manner of speaking." Pet. App. 48a. The ALJ nevertheless concluded that "Section 2(11)'s definition of supervisors is different from Webster's," and that "as I understand the meaning of that provision, Heartland's nurses were not supervisors." *Id.*

The ALJ recognized that the various duties characterized as supervisory in Section 2(11) of the Act, 29 U.S.C. 152(11), must be read "in the disjunctive." Pet. App. 34a (*quoting Phelps Community Medical Center*, 295 NLRB No. 55 (June 15, 1989)). The ALJ accordingly acknowledged that if the nurses had authority to engage in any one of the 12 supervisory activities enumerated in the statute, they could not claim protection of the Act if the other statutory requirements were satisfied.

The ALJ acknowledged that the staff nurses have wide ranging duties and extensive authority. He nevertheless concluded that the staff nurses' responsibilities did not constitute statutory supervision either because they were not performed "in the interest of the employer" (*id.* at 40a); were exercised in a "routine" fashion; or were exercised in a manner that did not affect the job status of the aides. *Id.* at 44a, 45a, 46a, 49a.

First, the ALJ concluded that the staff nurses did not have authority to "assign" work to the aides in a manner that required the "use of independent judgment" within the meaning of Section 2(11). The ALJ reached this legal conclusion even though he also found that staff nurses have authority to reassign aides from one wing to another; to assign aides to specific patients; to call in off-duty aides when replacements are necessary; to approve overtime; "to vary the aides' assignments in ways that can make a difference to the aides"; and are "expected to exercise judgment in exercising that authority." Pet. App. at 39a.[16]

The ALJ also determined that the staff nurses did not have authority "responsibly to direct" the aides in the interest of HCR. The record, and the ALJ's opinion, is replete with evidence that the staff nurses were charged with the responsibility to exercise judgment and discretion in directing aides' work. The ALJ noted, *inter alia*, that the nurses "oversee the work of the aides" (Pet. App. 36a); "criticize an aide for improperly performing a task" (*id.* at 40a); "routinely speak[] to an aide whenever the nurse sees the aide failing to perform a task or performing it improperly" (*id.* at 43a); "routinely report problems about an aide's work or attendance to Heartland's administrator or D.O.N." (*id.* at 44a); sit in on disciplinary conferences with the aides (*id.*); "determine when the aides may take their work breaks" (*id.* at 40a); are the "senior personnel" at the facility during the evening and at night on week days, and on weekends (*id.* at 46a-47a); that the aides "follow [the nurses'] orders" (*id.* at 48a); and that the nurses are "in charge of a wing of the facility." *Id.* Despite this evidence, the ALJ concluded: "[t]hat does not equate to

[16] Because some of the nurses "followed old patterns" when making assignments, or permitted aides to choose assignments, the ALJ concluded that the job of assigning work to the aides did "not demand great skill and finesse of the nurses," and thus did not require the use of independent judgment. *Id.* at 38a, 40a.

'responsibly . . . direct[ing]' the aides '*in the interest of the employer.*'" *Id.* at 40a (emphasis added). The ALJ discounted the evidence of responsible direction because the "nurses' focus is on the well-being of the residents rather than of the employer." *Id.* The ALJ also suggested that the direction given "is closely akin to the kind of directing done by leadmen or straw bosses." *Id.*

The ALJ also found that the nurses did not have authority to "discharge," "reward," "discipline other employees," or "to adjust their grievances," within the meaning of Section 2(11). The ALJ's determination rested on the view that the nurses themselves did not possess personnel authority to impose penalties upon the aides (*id.* at 44a), and that the record did not reveal that an aide had been fired solely as a result of a poor performance appraisal submitted by a staff nurse. *Id.* at 45a. The ALJ reached this conclusion despite his finding that staff nurses routinely report deficiencies in the aides' performance to upper management and that "[s]ometimes these reports have major consequences for an aide—as in the aide being fired or being advised that any further occurrence will result in discharge." *Id.* at 44a.[17]

2. Having concluded that the nurses were "employees," the ALJ considered the merits of the alleged unfair labor practices. The ALJ concluded that respondent legitimately discharged three nurses for their continued negativism and failure to work with management as a team.[18] *Id.* at 63a. He also found that respondent was justified in issuing warnings for excessive absences to three nurses, for improper documentation to two nurses, and for im-

[17] The ALJ simply ignored evidence that the nurses are authorized to terminate an aide for resident abuse. Tr. 1294-95.

[18] HCR's human rescources representative investigated complaints and learned that these three nurses caused many of the problems both within the facility and with its relationships to physicians and the community. Pet. App. 56a. The nurses were terminated because they refused to fulfill their obligations to promote the well being of the facility. *Id.* at 56a, 63a.

proper assignments to one nurse. *Id.* at 66a, 70a. The ALJ found, however, that two warnings issued by HCR to nurses for missing an in-service meeting did violate the Act. *Id.* at 68a.[19] He ordered HCR to remove those warnings from the affected employees' personnel files and to post an appropriate notice. *Id.* at 73a-74a.

C. The Decision of the NLRB

The General Counsel filed exceptions to the ALJ's decision, and HCR filed cross-exceptions. The Board disposed of the threshold supervisory issue in a footnote stating that "[t]he judge found, and we agree, that the Respondent's staff nurses are employees within the meaning of the Act." Pet. App. 13a n.1. The opinion does not reflect, in any respect, the legal or factual analysis that led it to affirm the ALJ's ruling on this issue.

The Board then rejected the ALJ's factual findings concerning HCR's discipline and discharge of the licensed practical nurses. The Board concluded that HCR violated the Act. Pet. App. 17a-27a.

D. The Decision of the Court of Appeals

The Sixth Circuit reversed the Board's decision. The court held that the staff nurses are "supervisors" within the meaning of Section 2(11) because their duties—assigning specific tasks to aides and responsibly directing the work of the aides—"require the use of independent judgment and are taken in the interests of the employer." Pet. App. 10a. The court concluded that the Board's decision was predicated on an erroneous interpretation of the Act, and was not supported by substantial evidence. Pet. App. 8a-11a.

1. Although the Board's opinion did not set forth any reasons for its resolution of the supervisory issue, the

[19] Although the nurses testified to other reasons for missing the in-service meeting, the ALJ concluded that HCR disciplined them because it believed their absence from the meeting was protected concerted activity.

court read the decision as a conclusory application of the Board's rule concerning the supervisory status of nurses. The court of appeals observed that, "[t]he Board has always taken the position that a nurse is not a supervisor when her conduct is in the furtherance of the patient's interest" because the Board maintains that such nurses are "working for the patient's interests, not the interests of their employers." *Id.* at 8a. The court of appeals noted that it had previously rejected the Board's construction of the Act and held that nurses who meet the statutory definition of supervisor are not disqualified from being supervisors simply because their duties are largely devoted to the care of nursing home residents. *Id. See NLRB v. Beacon Light Christian Nursing Home,* 825 F.2d 1076 (6th Cir. 1987); *Beverly California Corp. v. NLRB,* 970 F.2d 1548 (6th Cir. 1992).[20] Despite this precedent, the Board sought affirmance of its order in this case, asserting that "direction of other employees is supervisory only if it goes beyond the needs of patient care." Govt. C.A. Br. at 23.

Relying on its earlier decisions in *Beacon Light* and in *Beverly California Corp.,* the court concluded that the Board's patient care rule could not be reconciled with the language or purposes of the statute. First, the court observed that the language requires a finding that "any" individual who "meets the statutory tests" is a "supervisor" and that "there is no exception for supervisors in the health care field." Pet. App. 7a (*quoting Beverly California Corp.,* 970 F.2d at 1552). The court emphasized that the definition of supervisor is clearly stated, has remained unchanged since Congress enacted the Taft-Hartley Act in 1947, and that Congress considered excluding registered nurses from the defiintion of supervisors in 1974, but did not do so. Pet. App. 7a. As the

[20] In *Beacon Light* and in *Beverly California Corp.,* the Sixth Circuit reversed Board decisions holding that nurses were not supervisors because they purportedly directed employees in the interest of the resident and not in the interest of the nursing home.

Sixth Circuit concluded in *Beacon Light,* "if Congress had desired to remove health care supervisors from the pre-existing class of supervisors in the Health Care Amendments of 1974, Pub.L.No. 93-360, 93d Cong., 2d Sess., 1974 U.S. Cong. & Admin. News 3946, it certainly knew how to express such a change in the text of the Amendments." 825 F.2d at 1080; *see also* Pet. App. 11a.

The court also emphasized the importance of the definition of supervisor to the purposes of the statutory scheme. The court observed that "[t]he exclusion of supervisors from coverage under the Act was considered essential to allow employers to have the undistracted allegiance of employees in key positions" and that Congress excluded supervisors to maintain "a reasonable balance of power between employers and unions which could potentially arise if supervisors were themselves union members." Pet. App. 6a-7a. The Board's rule, according to the court, impermissibly ignored these statutory distinctions between supervisors and employees.

2. Assessing the record without reliance on the Board's view that "mere patient care" does not constitute statutory supervision, the court found that "the staff nurses are indeed supervisors within the definition of Section 2(11)." Pet. App. 8a-9a. The court of appeals found that HCR's evidence concerning supervisory status of the staff nurses was "clear" and that staff nurses "must" be considered supervisors because they had "authority to assign the nurses aides and to responsibly direct them"—two of the 12 functions set forth in 29 U.S.C. 152(11)[21]

[21] Contrary to petitioner's suggestion (Pet. Br. at 13), the court of appeals did not reject HCR's argument that the staff nurses performed other supervisory functions as well. The opinion states that the two activities cited by the court were "among" the nurses' functions (Pet. App. 9a) and that proof of *"any one"* (*id.* at 10a) of the enumerated functions was sufficient. If this Court adopts the Board's interpretation of the statute, the court of appeals' decision should be affirmed on these alternate grounds or remanded for further consideration.

—and that authority was exercised "in the interests of the employer," and "require[s] the use of independent judgment." Pet. App. 9a-10a.

The court summarized the extensive evidence concerning the nurses' authority to exercise discretion in the assignment of work to the aides and concluded that the staff nurses' duties "clearly require both assigning aides to specific tasks" and "directing the operation of the aides, as well as the entire nursing home" at various times of the day. Pet. App. 10a. The court accordingly concluded that the Board had failed to meet its burden of establishing that the staff nurses were not supervisors within the meaning of the Act.[22] The court granted the petition for review and denied the Board's cross application for enforcement.[23]

SUMMARY OF THE ARGUMENT

I. A. The Board contends that licensed practical nurses employed by HCR who serve as direct superiors to nurse aides are not "supervisors" under Section 2(11) of the Act. 29 U.S.C. 152(11). Petitioner asks this Court to defer to the Board's view that a nurse's direction of aides is not pursuant to "authority, in the interest of the employer," as required by Section 2(11). 29 U.S.C. 152(11). The Board reads this phrase to mean that a nurse exercises authority "in the interest of the employer" only when performing personnel functions that affect job status or pay. Pet. Br. at 20. The language of the phrase plainly does not draw such a line, and other

[22] The court of appeals also found that HCR had submitted substantial evidence to support its claim that the LPNs were supervisors. Pet. App. 9a. In any event, this Court declined to grant certiorari on the question whether the court of appeals properly allocated the burden of proof. Jt. App. 128.

[23] The court found that "[s]ince the staff nurses are supervisors and not covered under the Act" it "need not review the merits of the unfair labor practice claims." Pet. App. 11a. In the event of a reversal in this Court, this issue would remain open on remand.

language in Section 2(11) forecloses the Board's construction. There is accordingly no basis to afford any deference to the Board's interpretation.

B. The statute clearly establishes that Congress decided *not* to make "personnel authority" that affects job status or pay a prerequisite for supervisory status. An employee who "discipline[s]" *or* "responsibly . . . directs" *or* does other enumerated tasks is a supervisor if the other statutory criteria are met. 29 U.S.C. 152(11). Further, the rule advanced by the Board is inconsistent with the statutory requirement that the same definition of "supervisor" must apply to "any" employee. *Id.* Yet here, the Board only seeks to apply its rule of interpretation to employees who rely upon "professional norms" to perform their duties. Pet. Br. at 25. The unambiguous language of the statute forecloses this result.

This Court, moreover, has previously determined that the same phrase in issue here—"the interest of the employer"—should be given its ordinary meaning. In *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 488-89 (1947), this Court rejected the interpretation adopted in the dissenting opinion which—like the Board in this case—construed this phrase to refer solely to employees with authority to formulate and execute labor policies. *Id.* at 496. The Court found, instead, that this phrase represented "an adaptation of the ancient maxim of the common law, respondeat superior." *Id.* at 489. More recently, in *NLRB v. Yeshiva University*, 444 U.S. 678, 684 (1980), this Court found that an employee who acts pursuant to "professional interests" is acting in furtherance of the employer's interest because "the two are essentially the same."

C. The Board asks this Court to determine the meaning of the language adopted by Congress in 1947 through reference to statements in committee reports drafted in 1974 to accompany legislation that *made no change* in the statutory definition of "supervisor." Such

statements are inherently unreliable, and not entitled to any significant weight. The statements do not, in any event, support the Board. At best, the statements relied upon suggest that the Board should adhere to its pre-1974 precedents. The Board in fact has not done so. Prior to 1974, the Board granted supervisory status to nurses through the application of the same statutory criteria that it uses in any other context. This Court should require the Board to resume its prior practice—the only practice permitted by the statute.

D. The Board's rule is also not supported by its invocation of underlying policies. The best way to ensure that Congressional policies are fostered is to adhere to the words Congress wrote. The Board's policy concerns are not well grounded in any event. First, the Board contends that a literal interpretation will deny organizational rights to employees who do not engage in any functions that demand undivided loyalty. This is so, says the Board, because nurses who direct aides act pursuant to "professional norms," which serve to prevent any potential for divided loyalty. This reasoning does not make any sense. An employee who has significant responsibility to oversee the work of other employees, and to report infractions to management, must have undivided loyalty to the employer. The Board's argument echoes the one that it made in *Yeshiva*. There, the Board said there was no "danger of divided loyalty" because the university expected its faculty to "pursue professional values rather than institutional interests." 444 U.S. at 688. This Court disagreed. *Id.* at 688-90.

Nor does application of the statutory criteria lead to the wholesale exclusion of professionals from the Act, as petitioner contends. The Board's rule, however, would preclude supervisory status for all professionals except those who exercise the power to discipline employees. And, as its position in this case reflects, the Board exceeds the logic of its own rule by seeking to

apply it here to licensed practical nurses who are not even professionals.

II. Petitioner requests this Court to find that HCR's staff nurses do not possess supervisory authority under the Board's test. Pet. Br. at 31. Because the Board's test "rests on erroneous legal foundations," the Board's order in this case cannot be upheld. *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1922) (*quoting NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105, 112 (1956)). As the court of appeals found, the evidence is "clear" that HCR vested its staff nurses with authority to "assign" and "responsibly to direct" aides in the interest of HCR. Pet. App. 10a. The ALJ found that the staff nurses regularly "criticize" aides for "improper performance of their work" and "routinely report problems about an aide's work or attendance to [upper management]." Pet. App. 40a. HCR's staff nurses are "in charge" of a wing of the facility for an entire shift (Pet. App. 48a), and they are the "senior personnel" present during most of the facility's operating hours. Pet. App. 46a. As the ALJ acknowledged, "in common parlance" (Pet. App. 48a), HCR's nurses are supervisors. They are also "supervisors" under Board precedents that apply the statutory criteria, instead of the special "patient care" rule that the Board devised to enlarge the organizational rights of nurses beyond that afforded by Congress. The decision of the court of appeals should be affirmed.

ARGUMENT

I. THE COURT OF APPEALS WAS NOT REQUIRED TO DEFER TO THE BOARD'S LEGAL STANDARD FOR DETERMINING WHEN A NURSE IS A "SUPERVISOR" WITHIN THE MEANING OF 29 U.S.C. 152(11) BECAUSE THAT STANDARD CONFLICTS WITH THE STATUTORY LANGUAGE

In this case, the Board found that the licensed practical nurses who serve as the senior personnel in the nursing home during 75% of its operating hours are not "supervisors," even though they have the primary responsibility for ensuring that subordinate employees provide quality care to the residents. The Board defends its determination that these nurses are not "supervisors" on the ground that the direction of "patient care" is not activity performed "in the interest of the employer," as that term is used in the statute. Pet. at 11. The Board claims that nurses act "in the interest of the employer" only if they exercise "personnel authority" that can "affect the aides' job status or pay." Pet. Br. at 20. The court of appeals properly declined to give any deference to the Board's interpretation because it cannot be reconciled with the language of the Act, and it is inconsistent with this Court's prior precedents. *See, e.g., Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 171 (1989) ("[N]o deference is due to an agency interpretation at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language."); *Florida Power and Light Co. v. International Bhd. of Elec. Workers, Local 641*, 417 U.S. 790 (1974) (declining to adopt Board's definition of the class of supervisors entitled to protection from union discipline under Section 8(a)(1)(B) of the Act); *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 847-48 (1992) (declining to defer to the Board's interpretation of the Act where the

Board had not properly interpreted prior decisions of this Court).[24]

A. The Statutory Requirements For Supervisory Status

1. Prior to 1947, the NLRA did not exclude supervisors from the protections afforded by the Act. Section 2(3) of the NLRA provided, at that time, that the term "employee" shall include "any employee." Act of July 5, 1935, ch. 372, § 2(3), 49 Stat. 450. Relying on the plain language of that definition, this Court held in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947), that foremen supervising an employers' workforce were entitled to unionize because Congress had not said otherwise.

Congress responded to this imbalance in 1947 by excluding supervisors from the definition of employees entitled to engage in concerted activity. *See* National Labor Relations Act, ch. 120, Tit. I, § 101, 61 Stat. 137-138 (codified at 29 U.S.C. 152(3)) (the term "employee shall not include . . . an individual employed as a supervisor"); 29 U.S.C. 164(a) ("[N]o employer . . . shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining"). The purpose of these amendments was to "assure the employer of the loyalty of his supervisors." *Florida Power and Light Co.*, 417 U.S. at 808; *see also Beasley v. Food Fair of North Carolina*, 416 U.S. 653, 661-62 (1974) (finding that Congress' "dominant purpose" was to "redress a perceived imbalance . . . that was found to arise from putting supervisors in the position of serving two masters with opposed interests").

2. The definition of supervisor adopted in the 1947 amendments to the NLRA has never been modified. The statute defines a supervisor as:

[24] Even under a deferential standard of review, however, the Board's interpretation should be rejected because it is unreasonable, and has not been consistent. *See* discussion *infra* at 35-37; *see also* amicus brief of American Health Care Association (AHCA).

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. 152(11).

The language of this section reveals three prerequisites for a finding of supervisory status. First, the individual must have authority to perform *one* of the 12 functions listed in Section 2(11). The use of the word "or" to separate the enumerated functions leaves no doubt that the statute must be read in the disjunctive. *See* Pet. App. 8a; *see also Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir.), *cert. denied*, 338 U.S. 899 (1949); National Labor Relations Board, *Twenty-Fifth Annual Report* at 45 (1960). Second, the statute provides that the individual must "hav[e]" the "authority" to perform that function "in the interest of the employer." Third, the individual's "exercise of such authority" cannot be "merely routine" or "clerical," but must require "the use of independent judgment." 29 U.S.C. 152(11).

The Board contends that respondent's staff nurses were not supervisors under its rule even to the extent they used "independent judgment" to perform functions listed in Section 2(11). The central issue presented by the Board, therefore, is whether nurses who use independent judgment to "assign" and "responsibly to direct" aides are exercising authority "in the interest of the employer."[25]

[25] The Board does not ask this Court to uphold its order in this case under any other theory. Pet. Br. at 13, 31, 33-34.

B. The Board's Interpretation Of The Statutory Requirement That Employees Must Be Authorized To Perform Supervisory Functions "In The Interest Of The Employer" Conflicts With The Plain Language Of The Act And This Court's Precedents

Petitioner concedes that when HCR's staff nurses exercise authority over the aides' delivery of care to nursing home residents, they are acting in a way that furthers HCR's business interests. Pet. Br. at 25. The Board could not possibly contend otherwise. *Cf., Beth Israel Hospital v. NLRB*, 437 U.S. 483, 506 (1978) (noting that the function of a hospital is "patient care"). The Board nevertheless asserts that "[i]f [the phrase] is to have significance," it cannot be interpreted literally. Pet. Br. at 25. Instead, the Board contends it should be read to mean that nurses directing the work of aides act "in the interest of the employer" only when they are vested with "personnel authority" to affect the job status or pay of aides. Pet. Br. at 20; Pet. at 16. Under the Board's interpretation, nurses act "in the interest of the employer" when they discharge an aide, but do not act "in the interest of the employer," when they direct the aides' delivery of "patient care" pursuant to "professional norms." Pet. Br. at 24. The statute, of course, does not include any such words of limitation. It says "in the interest of the employer," 29 U.S.C. 152(11)—not just the "personnel" or "managerial" interests of the employer. As this Court has noted on other occasions, "[t]he short answer [to the Board's contention] is that Congress did not write the statute that way." *United States v. Monsanto*, 491 U.S. 600, 611 (1989) (*quoting United States v. Naftalin*, 441 U.S. 768, 773 (1979)).

1. The Board's interpretation of the phrase "interest of the employer" is contrary to its ordinary meaning, and is also refuted by other language used to define "supervisor." The court of appeals correctly held that the Board's interpretation conflicts with the statute.

a. The Board contends that a health care professional does not act in the "interest of the employer" absent personnel authority to affect the job status or pay of subordinate employees. The disjunctive language of Section 2(11), however, makes it absolutely clear that Congress *did not* make such personnel authority a prerequisite for supervisory status. Section 2(11) describes three distinct categories of supervisory activities. The first of the three clauses encompasses authority that could be described as "personnel authority." That clause includes authority to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees." The second clause, in contrast, only includes authority "responsibly to direct" other employees. The third clause encompasses authority to "adjust [employees'] grievances." By separately including responsible direction of employees within the list of supervisory functions, Congress clearly established that an employee does not have to exercise the types of personnel authority listed in the first of the three clauses to be a supervisor.

Both the Board,[26] and the courts,[27] have recognized in other contexts that personnel authority to hire, fire, and

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[26] *See Dale Service Corp.*, 269 NLRB 924 (1974) (senior operators at sewage treatment plant are supervisors where they assign and adjust workloads, approve overtime, and are responsible in general manager's absence); *Warren Petroleum Corp.*, 97 NLRB 1458 (1952) (chemist who responsibly controlled and directed activities of assistant was a supervisor despite his lack of authority to hire, fire, or otherwise effect changes in the status of assistants); *Sarah Neuman Nursing Home*, 270 NLRB 663, 675-77 (1984) (technical food service employee who responsibly directs lesser skilled and lesser educated employees is a supervisor). *See also Massachusetts Coastal Seafoods, Inc.*, 293 NLRB 496, 506 (1989); *Clark & Wilkins Indus. Inc.*, 290 NLRB 106, 114-15 (1988); *Iron Mountain Forge Corp.*, 278 NLRB 255, 257-59, 262 (1986).

[27] *See, e.g., Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir.), *cert. denied*, 338 U.S. 897 (1949) (holding that control operators who "have no authority to hire or fire" are supervisors because they are "charged with the responsible direction of the generating unit and the men under him."); *see also Yeshiva*, 444 U.S. at 682 n.13

discipline employees is *not* a prerequisite for supervisory status because responsible direction is all that Congress required. Indeed, the language "responsibly to direct" was added to the definition of "supervisor" to clarify that a supervisor does not have to possess personnel authority.[28] The Senator who sponsored the amendment proposed this language because the bill seemed "to cover

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(noting that "[a]n employee may be excluded if he has authority over *any one* of 12 enumerated personnel actions, *including* hiring and firing") (emphasis added); *NLRB v. Fullerton Publishing Co.*, 283 F.2d 545 (9th Cir. 1960) (the head of a news department was a supervisor despite absence of personnel authority because the authority to direct or assign his reported subordinates in the performance of their reportorial duties was responsible direction); *NLRB v. McCullough Envtl. Servs.*, 144 LRRM 2626, 2639 (5th Cir. 1993) (lead operators at sewage treatment plant responsibly directed work where they were highest ranking official on duty and were responsible for operation of plant for more than 75% of its operating hours); *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347 (1st Cir. 1980) (shift operating supervisors who had authority to responsibly direct other employees were supervisors despite the absence of authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees); *Arizona Public Service Co. v. NLRB*, 453 F.2d 228 (9th Cir. 1971) (persons who responsibly directed employees in the field after business hours and during emergencies were supervisors within the meaning of the Act.); *Keener Rubber, Inc. v. NLRB*, 326 F.2d 968 (6th Cir. 1964) (want of authority to hire, fire, lay off, recall, promote or discharge employees did not preclude classification as supervisor, where person was in charge in shift and responsibly directed employees).

[28] The Senate bill initially defined supervisor as follows:

> (11) The term supervisor 'means any individual having authority, in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

93 Cong. Rec. 4677-4678 (1947).

adequately everything except the basic act of supervising staff." [29]

Even though the disjunctive clauses of Section 2(11) make it clear that "personnel authority" is not a prerequisite for supervisory status, the Board nevertheless asserts that this Court should construe the phrase "in the interest of the employer" to impose that precise requirement. The Board's interpretation deprives the phrase "responsibly to direct" of any meaning whatsoever. Under the Board's view, responsible direction could never constitute a basis for supervisory status in the absence of authority to perform functions listed in the other clauses of the section. This Court will not defer to interpretations that do not give effect to all the words chosen by Congress. *See, e.g.*,

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[29] The sponsor offered the amendment on the Senate floor and explained its purpose in the following terms:

> As an employer for many years past, and until I resigned to enter this body, I can say that the definition of "supervisor" in this Act seems to me to cover adequately everything except the basic act of supervising staff. Many of the activities described in paragraph (11) are transferred in modern practice to a personnel manager or department. The supervisor may recommend more or less effectively, but the personnel department may, and often does, transfer a worker to another department or other work instead of discharging, disciplining or otherwise following the recommended actions.
>
> In fact, under some modern management methods the supervisor might be deprived of authority for most of the functions enumerated and still have large responsibility for the exercise of personal judgment based on personal experience, training and abilities. He is charged with the responsible direction of his department and the men under him. He determines under general order what jobs shall be undertaken next and who shall do it. He gives instructions for its proper performance. If needed, he gives training in the performance of unfamiliar tasks to the worker to whom they are assigned. Such men are above the grade of 'straw bosses, leadmen, set-up men, and other minor supervisory employees, as enumerated in the [Senate Committee] report.' Their essential managerial duties are best defined by the words, "direct responsibly," which I am suggesting.

93 Cong. Rec. 4677-4678 (1947).

Florida Power, 417 U.S. at 803. The court of appeals properly rejected the Board's interpretation on this ground. Pet. App. 8a.

b. The court of appeals was also correct in its view that the Board's rule is inconsistent with the statutory mandate that the same definition of "supervisor" must apply to "any" employee. 29 U.S.C. 152(11); Pet. App. 7a. The Board cannot, therefore, define "the interest of the employer" to mean one thing for health care workers and another thing for workers in other industries. Nor did Congress establish a different statutory definition of supervisors for professional employees. Congress instead provided that "any" employee given "authority, in the interest of the employer" to engage in activity defined as supervisory is excluded from coverage under the Act. 29 U.S.C. 152(11). The same statutory criteria must be applied to nurses, carpenters, or truck drivers. The statute makes no distinction.

c. The Board's construction also ignores the full text of the operative phrase. Supervisors include those individuals "*having authority*, in the interest of the employer." 29 U.S.C. 152(11) (emphasis added). The Board's interpretation pays no heed to the first two words of the phrase. The Board contends that when a nurse directs an aide in reliance on "professional norms" rather than "management's business norms" (Pet. Br. at 25), the nurse is not acting in "the interest of the employer." But the Board's argument ignores the fact that the test for supervision turns on the nature of the employee's "authority" to perform supervisory activity. While nurses may use "professional norms" in deciding how to direct the activities of subordinate employees, their "authority" must come from the employer. The professional employee, the licensed practical nurse, and the skilled carpenter alike have no "authority" to direct other employees solely by virtue of their training or education. The nurses' "authority" to "assign" and "responsibly to direct" the activities of the aides in the nursing home is conferred only by the em-

ployer—in its own interest—and not by professional norms.

2. On two occasions, this Court has rejected arguments that this phrase—the "interest of the employer"—should not be given its ordinary meaning. *See Packard Motor*, 330 U.S. at 488-89; *Yeshiva*, 444 U.S. at 687, 688. Those decisions should be controlling here as well.

a. In *Packard Motor*, 330 U.S. at 488-89, this Court adopted a literal construction of the same statutory phrase that now appears in Section 2(11), 29 U.S.C. 152(11). Prior to the passage of the Taft-Hartley amendments in 1947, the term "employer" was defined to include "any person acting in the interest of an employer." *Id.* at 488 (*citing* 1935 National Labor Relations Act § 2(2), 49 Stat. 450). The issue in *Packard* was whether foremen who supervised employees were protected by the Act. The petitioner argued that employees who exercised supervisory authority should be included within the definition of "employer" under the Act, and excluded from the definition of "employee." 330 U.S. at 488. The petitioner's argument was based upon the fact that "employer" was defined to include persons who acted "in the interest of an employer." The Court considered whether that phrase could be read to refer solely to employees acting in a supervisory capacity and not to other employees. *Id.* The Court rejected this circumscribed construction of the language, observing that the statutory phrase represented "an adaptation of the ancient maxim of the common law, respondeat superior." *Id.* at 489. The dissenting opinion, like the Board in this case, construed the phrase to refer solely to employees with authority to formulate and execute labor policies. *Id.* at 496. The Court, however, found that it referred to every employee who "owes to the employer faithful performance of service in his interest." *Id.* at 489; *see also Carbon Fuel Co. v. United Mine Workers of America*, 444 U.S. 212, 217 (1979) (describing the phrase construed in *Packard Motor* as a "very loose test of responsibility").

The *Packard Motor* interpretation of "the interest of the employer" as a loose "adaptation of . . . respondeat superior" should control here as well. First, Congress drafted the definition of Section 2(11) in 1947 to incorporate the same language construed in *Packard Motor*. It is doubtful that Congress would have chosen these precise words if it did not intend for them to be construed according to the Court's interpretation in *Packard Motor*.[30] Second, the interpretation adopted in *Packard Motor* makes sense in this case. As the Court noted in *Packard Motor*, 330 U.S. at 489, the definitions of employee and employer should be read to differentiate between actions taken by employees in their own personal interest, and actions taken in furtherance of the employer's business interest. If Congress had not defined supervisors with reference to the "interest of the employer," the literal language of the section would extend to a variety of actions that Congress did not intend to encompass. For example, union stewards often have authority to "adjust grievances" exercising "independent judgment." 29 U.S.C. 152(11). The only reason they are not "supervisors" is because they are not individuals "having authority, in the interest of the employer" to adjust grievances.[31] The court

[30] This rule of construction has special force in this case because Congress chose to change the language used in § 2(2)—the definition of employer—at the same time that it incorporated that phrase into § 2(11). In *Carbon Fuel*, the Court noted that Congress amended the definition of "employer" in 1947 to adopt a somewhat more restricted "common-law agency test." 444 U.S. at 217. *See* 29 U.S.C. 152(2) (defining "employer" as "any person acting as an agent of an employer"); *see also* H.R. Conf. Rep. No. 570, 80th Cong., 1st Sess., *reprinted in* 1947 U.S.C.C.A.N. 1135, 1137 (explaining the changes as a response to Board decisions finding an employer responsible "for the acts of subordinate employees and others although not acting within the scope of any authority from the employer, real or apparent"). This same "loose test of responsibility," *Carbon Fuel*, 444 U.S. at 217, was nevertheless used to define supervisors in the 1947 amendments.

[31] Similarly, the Board and courts have recognized that the statute requires differentiation between acts undertaken by an employee in his personal capacity as an owner of property, and actions undertaken pursuant to "authority, in the interest of the employer." *See, e.g., Deaton Truck Line, Inc. v. NLRB*, 337 F.2d 697 (5th Cir. 1964), *cert. denied*, 381 U.S. 903 (1965) (court affirmed Board order that owner-operators of trucks were supervisors and acted in the "interest of the employer" because owner-operators' interest in protecting their investment and employer's interest in making profit were so intertwined that powers were exercised for both); *National Freight, Inc.*, 146 NLRB 144 (1964) (distinguishing between a truck driver's interest as an owner of a vehicle and the employer's interest and suggesting that actions "integral" to the employer's business operations should be construed as actions taken "in the interest of the employer"). *Cf., NLRB v. Scott Paper Co.*, 440 F.2d 625, 630 (1st Cir. 1971) (court rejected Board's argument that tractor owner-operators were not supervisors because the court found that their interest and the interest of the employer company "were so intertwined that the powers were exercised for both").

of appeals correctly determined that it is not necessary to rewrite the statutory language to give it meaning, and the interpretation of the same phrase adopted in *Packard* should control.

b. This Court also rejected the Board's effort to depart from a literal interpretation of actions taken "in the interest of the employer" in *NLRB v. Yeshiva University*, 444 U.S. at 688. In that case, the Board argued that faculty members who formulated and implemented policy for the university should be protected by the Act because they were not supervisory or managerial employees. The Board's argument was almost indistinguishable from that advanced here. The Board asserted that the faculty did not perform their policy functions "in the interest of the employer," because the faculty's actions were guided by their own professional judgment and not by management policies. 444 U.S. at 678, 684. In the context of construing the implied "managerial" exception to the Act, the Court declined to accept the Board's circumscribed definition of actions undertaken in the "interest of the employer."

This Court concluded in *Yeshiva* that the Board did not have authority to draw the line between managers and employees by determining whether their actions were guided by their own professional interests or those of the

institution. The Court held that the faculty's "professional interests" simply "cannot be separated from those of the institution" because there can be "no doubt that the quest for academic excellence and institutional distinction is a 'policy' to which the administration expects the faculty to adhere, whether it be defined as a professional or an institutional goal." 444 U.S. at 688. The Court accordingly concluded that it is "fruitless to ask whether an employee is 'expected to conform' to one goal or another when the two are essentially the same." *Id.*[32] So too here. There is simply no basis in the language of the statute to conclude that direction given to aides in the interest of nursing home residents, pursuant to professional norms, is not "in the interest of the employer."

C. The Board's Interpretation Is Neither Required Nor Supported by the 1974 Health Care Amendments

The Board's interpretation of "the interest of the employer" has no foundation whatsoever in the words actually chosen by Congress. It is therefore not surprising that the Board seeks support for its rule in pages of the congressional record. Petitioner contends that this Court should reject the ordinary meaning of the language adopted by Congress in 1947 in reliance upon statements in committee reports concerning amendments to *other sections* of the NLRA in 1974. National Labor Relations Act Amendment of 1974, Pub. L. No. 93-360, 88 Stat. 395; Pet. Br. at 18-19. It is not appropriate, however, to consult this history because the language is clear. *See, e.g., Packard*, 330 U.S. at 492. In any event, the court of appeals correctly determined that the 1974 health care amendments do not support the Board's interpretation of the Act. Pet. App. 7a.

1. As the court of appeals found, the most significant thing about the 1974 health care amendments is what

[32] Although it did not specifically refer to *Yeshiva*, the Board recently described the *Yeshiva* holding as "an argument" and stated that, "We [the Board] find that argument too simplistic." *Northcrest Nursing Home*, 313 NLRB No. 54 at 4 (Nov. 26 1993).

Congress did, not what it said. Pet. App. 7a. At the conclusion of extensive legislative debates, Congress extended the protections of the NLRA to employees of nonprofit hospitals, but made *no changes* to the definition of supervisor adopted in 1947. The court correctly noted that "[i]n 1974 the Senate Labor Committee considered recommending enactment of legislation to create such an exception, but the idea was dropped." Pet. App. 7a-8a (*quoting Beverly California Corp.*, 970 F.2d at 1551-1552); *see* S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974) ("Senate Report").

Before the 1974 amendments, a number of interest groups urged Congress to amend Section 2(11), 29 U.S.C. 152(11), to exclude *registered* nurses and other health care professionals. A representative of the American Nurses' Association ("ANA") explained the reason for seeking the amendment:

> Almost all nurses exercise independent judgment and professional authority to direct other employees. Few, however, possess the "bureaucratic" authority envisioned in the NLRA definition of "supervisor"—to effectively recommend hiring, firing, promotion and discharge. In nursing, the term "supervisor" should be limited to those registered nurses who truly and substantially possess and exercise such authority over other registered nurses.

Coverage of Non-Profit Hospitals Under National Labor Relations Act, 1972, Hearings on H.R. 11357 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. 16, 17-18.[33] In other words, the ANA urged Congress to amend the definition of supervisor because nurses who do not have personnel authority to affect the job status of subordinate

[33] Representatives of the ANA testified that their "primary difficulty has been the interpretation of supervisors in relation to professionals." Hearings at 67.

employees could otherwise be found to be supervisors under the definition set forth in § 2(11). The test proposed by the ANA, which Congress chose not to adopt, bears a striking resemblance to the test the Board asks this Court to accept in this case. Because Congress chose not to "carve out an exception for the health care field," (Pet. App. 11a), the court of appeals correctly determined that the Board had no authority to do so.

2. Even though Congress did not amend the statute to incorporate the ANA's definition of supervisor, petitioner urges adoption of its rule based upon statements in the committee reports observing that the proposed amendments were "unnecessary because of existing Board decisions." S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974); Pet. Br. at 19. As set forth below, the passage of the report relied upon by petitioner did not express agreement with the rule advanced in this case. Even if it did, however, this Court has repeatedly declined to permit plain statutory language to be altered by subsequent legislative history. *See, e.g., Sullivan v. Finkelstein,* 496 U.S. 617, 628-29 n.8 (1990); *Public Employees Retirement Sys. v. Betts,* 492 U.S. 158, 168 (1989) (legislative history that is not linked to the enactment of statutory language is not entitled to significant weight). As this Court noted in *American Hosp. Ass'n v. NLRB,* 111 S. Ct. 1539, 1545 (1991), such statements cannot have the "force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating." *See also Pierce v. Underwood,* 487 U.S. 522, 566 (1988) (rejecting respondent's reliance on a 1985 House committee report interpreting attorneys' fees provisions in a 1980 statute because "[i]t is the function of the courts and not the legislature, much less a committee of one house of the legislature, to say what an enacted statute means").

This Court has also recognized that such statements simply cannot be trusted to give any reliable indication of what the original Congress intended, or even what motivated the subsequent Congress to reject proposed

amendments. *See, e.g., United States v. Wise,* 370 U.S. 405, 411 (1962) (rejecting interpretation offered by subsequent committee report because "[l]ogically, several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment in the light of the interpretation placed upon the existing law by some of its members"); *United States v. Price,* 361 U.S. 304, 313 (1960) (stating that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one").

These concerns have particular force in this case because portions of the legislative history, not cited by petitioner, demonstrate why such committee statements are inherently unreliable and not entitled to any significant weight. During the course of the legislative hearings, the sponsor of the 1974 amendments, Congressman Thompson, advised ANA representatives that the committee might be able to address their concerns about the supervisory status of registered nurses by "making legislative history" because Board representatives had advised him that "they would be able to handle the supervisor problem" if they had a "strong legislative history." [34] This colloquy provides an additional basis for concluding that the

[34] The full text of Congressman Thompson's statement is as follows:

> In devising the report this year we shall attempt to strengthen that language respecting the status of registered nurses. One major difficulty is in drafting the language to include in such a bill. The second is in making legislative history, which we can do in the report and in colloquy on the floor, which would have the same effect of calling the Board's attention in the likely event this becomes law, to that particular situation.
>
> I talked with the new Solicitor of the Board, who was formerly minority counsel to this Committee and is a very able man. I also talked to members of the Board, and they would anticipate that even absent specific statutory language with a strong legislative history, they would be able to handle this supervisor problem. They are quite aware of it.

Hearings on H.R. 1236 before the Special Subcomm. on Labor at the House Comm. on Education and Labor, 93d Cong., 1st Sess. 23-24

statements that ultimately found their way into the committee reports—those now relied upon by petitioner—should not be viewed as an autho itative expression of congressional will. *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-120 (1980) (noting the importance of examining the background of a committee statement in order to evaluate its weight).

This Court has in fact rejected arguments that the Board's authority should be construed through reference to the legislative history of the 1974 amendments rather than through the language of the Act as written. In *American Hospital Ass'n v. NLRB*, 111 S. Ct. 1539 (1991), the petitioner challenged the Board's promulgation of a rule establishing eight bargaining units in acute care hospitals. Petitioner relied upon the legislative history of the 1974 amendments that purported to support a four-unit rule. The Court declined to give this history any significant weight, construing the scope of the Board's authority in accordance with the language of the statute as written. The same approach should be followed here.

3. Even if this Court determines that the subsequent legislative history should be accorded some weight, the committee reports do not mean what petitioner says. In this case, petitioner contends that licensed practical nurses overseeing the work of a substantial number of aides in a nursing home are not statutory supervisors. The legislative history relied upon by petitioner and amicus, however, relates solely to *registered* nurses and other health care professionals. It is also focused primarily on the status of nurses in hospitals. There is no mention of licensed practical nurses in nursing homes, who are ad-

(1973). The notion that the legislative history was simply "made up" in response to the ANA's lobbying finds support in the Board's recent statement that before 1974 it had not applied to nursing homes what it now calls the patient care/professional/technical rule. *See Northcrest Nursing Home*, 313 NLRB No. 54 at 4, n.12 (1993). The Board's extraordinary action at this time in expressly overruling its pre-1974 decisions undermines the Board's position that its rule finds support in the 1974 Health Care Amendments.

mittedly "technical" employees. The Board's reliance on the purported legislative history is, therefore, misplaced.[35]

Moreover, the 1974 Committee Reports did not approve the rule petitioner articulates in this case. The Senate Committee instead expressed its expectation that the Board would analyze cases involving nurses the way it did before the amendments. Senate Report at 6. The Board has not in fact done so. Prior to 1974, the Board did not exclude nurses from the definition of supervisors simply because the activities they directed involved patient care.[36] Indeed, the Board's pre-1974 cases upheld the supervisory status of nurses who possessed less authority than the nurses employed by HCR. For example, in *University Nursing Home, Inc.*, 168 NLRB 263, 265 (1967), the Board stated:

> The licensed practical nurse at issue . . . is the nurse in charge of one of the three wings. She supervises the work of three nurses aides and one orderly in the performance of tasks of changing bed linens, bathing, feeding, massaging, and otherwise caring for patients in accordance with physician's instructions. . . . We find that the licensed practical nurse is a supervisor within the meaning of the act, and shall exclude her from the unit.

[35] The structure of the nursing department and the role of a nurse in a hospital are quite different from that of a nurse in a nursing home. *See Park Manor Care Center, Inc.*, 305 NLRB No. 135 (1991). In a typical nursing home, licensed practical nurses and nurses aides provide most of the care to the residents. There are typically more aides than nurses, and fewer supervisory levels than in hospitals. Pet. App. 34a. *Compare, e.g., Albany Medical Center*, 273 NLRB 485 (1985) and *Sherewood Enterprises, Inc.*, 175 NLRB 354 (1969) *with Avon Convalescent Center, Inc.*, 200 NLRB 702, 706 (1972); *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062 (4th Cir. 1982); *Northwoods Manor*, 260 NLRB 854 (1982); *Wedgewood Health Care*, 267 NLRB 525 (1983); and *Pine Manor Nursing Center*, 270 NLRB 1008 (1984).

[36] Indeed, the ANA's complaint was that the Board was determining that nurses were supervisors. *See supra* n.33.

Id. at 265. Similarly, in *Avon Convalescent Center, Inc.*, 200 NLRB 702, 706 (1972), the Board concluded that a nurse who was placed in charge of a section of a nursing home and had the authority to assign work to three or four aides and to report problems with their performance was a supervisor. The Board reasoned:

> In a nursing home servicing elderly and sick patients whose critical needs may momentarily require variations in standard procedures, the nurse responsible for supervision of other nurses or a shift or a section must obviously be prepared to exercise her discretion in utilizing her training and experience and assign and direct employees placed under her authority more than clerically or routinely. Furthermore, power to *enforce* important personnel policies, rules, and regulations is certain to require the exercise of independent judgment. Although the record does not establish that the nurses here in question hire, fire, or mete out discipline or directly recommend such action, their power to enforce major personnel policies and rules, short of such authority, is compelling evidence that their direction and assignment of employees is substantial and meaningful. The employees were notified of this power of the nurses and expected to obey their directions and assignments and interpretation of the Respondent's policies and rules.

Id. at 706 (emphasis in original).[37]

[37] *See also Garrard Convalescent Home, Inc.*, 199 NLRB 711, 717 (1972) (nurse who was in charge of five or six employees on her shift and who had authority to call employees in to cover absences and to send employees home if they were not doing their work was a supervisor within the meaning of the Act); *Donovon, d/b/a New Fairview Hall Convalescent Home*, 206 NLRB 688, 749 (1973) (nurse found to be a supervisor based upon her role in the assignment, direction and evaluation of support staff); *Isaac Putterman d/b/a Rockville Nursing Center*, 193 NLRB 959, 962 (1971) (nurse who responsibly directed non-professional support personnel was supervisor); *Sherewood Enterprises, Inc.*, 175 NLRB 354 (1969) (floor head nurses in hospital who assigned nurses and nurses' aides to particular patients and directed them as to how and when particular procedures should be performed, and who periodically evaluated work of those under them are supervisors).

Apparently recognizing that these cases severely undermine its interpretation, the Board, *after* submitting its brief in this case, simply overruled the pre-1974 cases:

> Prior to the 1974 Health Care amendments, the Board had found supervisory status based on assignments and direction in *Avon Convalescent Center*, 200 NLRB 702, 706 (1972) and *Rockville Nursing Center*, 193 NLRB 959, 862 (1971). Charge nurses in these cases were found supervisory because they utilized their professional judgment in assigning and directing other employees. *These cases are not consistent with the Board's current holdings which do not find supervisory status on this basis.* Accordingly, these cases are overruled.

Northcrest Nursing Home, 313 NLRB No. 54, at 4 n. 12 (Nov. 26, 1993) (emphasis added).

Prior to 1974, the Board applied the same test of supervisory status to health care workers as it did to all other employees. Through careful and considered application of the terms "responsibly to direct," "independent judgment," and "routine," the Board avoided the wholesale characterization of nurses as supervisors. The legislative history, at best, counsels the Board to continue doing what it used to do.[38] For the same reason, this Court's statement in *Yeshiva* that "Congress expressly approved" the Board's approach in 1974, 444 U.S. at 690 n.30, provides no basis for accepting the Board's position in this case.[39]

[38] The Board's continued reliance on the legislative history to support its position is curious in light of its admission that its present rule is inconsistent with pre-1974 decisions. *See Northcrest*, 313 NLRB No. 54 at 4. This admission also demonstrates that the cases cited by petitioner at page 22 of its brief are inapposite.

[39] Even if this Court's statement in *Yeshiva* could be read to suggest that Congress in fact approved the rule proffered by the Board in this case, that view should not be adopted here. The issue resolved in *Yeshiva* was whether the faculty members were man-

D. Departure From the Language of the Statute Is Not Supported or Required by the Policies of the Act

The Board contends that this Court is required to defer to the Board's interpretation of the Act because it represents a rational way to implement underlying labor policies. This Court has repeatedly held, however, that the best way to ensure that congressional policies are furthered is to adhere to the words Congress wrote. *See, e.g., Florida Power and Light,* 417 U.S. at 811 (1974) (overturning a long line of Board decisions because "[i]t is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute" (*quoting Colgate-Palmolive Peet Co. v. NLRB,* 338 U.S. 355, 363 (1949))); *see also Packard Motor Car Co.,* 330 U.S. at 490 (finding that inclusion of foremen in the Act would undermine an employer's interest in securing the undivided loyalty of its supervisors, but that "the effect of the National Labor Relations Act is otherwise, and it is for Congress, not for us, to create exceptions or qualifications at odds with its plain terms").

The policy justifications offered by the Board do not support its rule in any event. This Court has rejected efforts by the Board to limit the Act's exclusion of supervisory and managerial employees. *Yeshiva University,* 444 U.S. at 686-91 (declining to defer to the Board's interpretation of the managerial exclusion for university professors); *NLRB v. Bell Aerospace Co.,* 416 U.S. 267 (1974) (declining to defer to the Board's view that managerial employees are entitled to protection under the Act). This Court should do so here as well.

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agers excluded from the protection of the Act. The Court's discussion of the 1974 health care amendments and the Board's application of § 2(11) to health care professionals represent dicta that was in no way essential to the decision. On closely analogous facts, this Court has emphasized the propriety and importance of "reced[ing] from" similar characterizations of prior legislative history in a case where, as here, the issue is "squarely presented." *NLRB v. Hendricks County Rural Elec. Membership Corp.,* 454 U.S. 170, 188 (1981) (rejecting dicta in a prior decision concerning the interpretation of a Congressional committee report); *see also NLRB v. Boeing Co.,* 412 U.S. 67, 72 (1973).

1. The Board contends that its rule should be adopted because "[t]he conflict of loyalties that the supervisory exception is designed to avoid is not threatened when a nurse directs employees in reliance on professional norms rather than the managerial policies promulgated by the employer." Pet. Br. at 12. The Board contends that the "need for the employer to have the undivided loyalty of its agents" (Pet. Br. at 26) is implicated only when "nurses wield control over such assignment issues as who works what shift, effectively recommend or impose discipline, or effectively recommend or grant promotions or wage increases." Pet. Br. at 25-26. Otherwise, says the Board, there can be no conflict of loyalty because the nurses' direction of the aides will be based upon "professional norms" and "[s]uch an exercise of authority in the interest of patient care does not align the nurses with management." *Id.* at 24. This reasoning does not make any sense, and it was rejected in *Yeshiva.*

The language of Section 2(11) reveals that Congress clearly understood that the problem of divided loyalties would be present whenever an employee was charged with authority "responsibly to direct" other employees, even when that employee did not have authority to discipline others. *See* discussion *supra* at 23-25. If an employee, professional or otherwise, is charged with significant discretionary responsibility to ensure that the work of others is done properly and to report to management when it is not, the potential for conflicting loyalties is present. Faithful exercise of the power to "assign people to their work," to "see that they keep at their work and do it well," and to "correct them when they are at fault" requires undivided loyalty to management. *See Beasley v. Food Fair,* 416 U.S. at 660 (*quoting* H.R. Rep. No. 245, 80th Cong., 1st Sess. 16 (1947)). If nurses are permitted to align themselves with the aides they direct, it could "impair [their] loyalty" and diminish their willingness to report disciplinary and performance problems to manage-

ment. *Id.* at 660, 660-61; *see also Yeshiva,* 444 U.S. at 682 (conflict in loyalty needs to be prevented when employees "oversee[] other employees").[40]

The fact that a nurse may direct and evaluate the aides' work pursuant to "professional norms" does not reduce the potential for conflict. Work in many industries is governed by standards established by third parties. Skilled tradesmen, for example, must ensure that the employees they direct perform their work consistent with building codes, but the Board has never suggested that they are not acting "in the interest of the employer" when they enforce these standards, on the theory that there is no potential for divided loyalty.[41]

Further, the Court rejected this view of congressional policy in *Yeshiva.* This Court found that the congressional policy that "entitle[s]" an employer to the "undivided loyalty of its representatives," 444 U.S. at 682, extends to circumstances where an employee makes decisions based upon professional expertise. *Id.* at 688. In *Yeshiva,* the Board argued—just as it does here—that there was no "danger of divided loyalty" because the university expected its faculty to "pursue professional values rather than institutional interests." *Id.* at 684. The Court nevertheless found that the Board's approach would "undermine the goal" of ensuring that "employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union." *Id.* at 687-88. The Court emphasized that an employer

[40] The problem is not solved by putting nurses in a separate bargaining unit. Indeed, Congress specifically rejected that contention when defining supervisors. *See* Federal Labor Relations Act of 1947, S. Rep. No. 105, 80th Cong., 1st Sess. 9 (1947) (reporting the Committee's conclusion that "there is [no] such thing as a really independent foreman organization").

[41] *See, e.g., United Elec. and Mechanical, Inc.,* 279 NLRB 208, 212 (1986); *Maine Yankee Atomic Power Co. v. NLRB,* 624 F.2d 347 at 394 n.3 (1st Cir. 1980) (shift operating personnel who had to comply with numerous federal regulations in directing the operation of a nuclear power plant were determined to be supervisors).

must rely upon its managers and supervisors to "fulfill their professional mission by ensuring that the [employer's] objectives are met" without the risk of divided loyalty that arises when that employee is permitted to engage in collective activity. *Id.* at 688, 689-90. Under the rationale adopted in *Yeshiva,* the potential for divided loyalty exists whenever nurses engage in activities designated as supervisory under 29 U.S.C. 152(11). That is how Congress sought to identify employees with divided loyalties, and there is no need for the Board to create a different test out of whole cloth.

2. The Board further insists that failure to adopt its rule will nullify the congressional policy of extending the Act's coverage to "professionals." Pet. Br. at 12, 27.[42] By stating that the Court should "limit the supervisory exception as applied to professionals," the Board impliedly concedes that its rule is inconsistent with the statutory language. *Id.* at 12. This case, of course, does not involve employees who are "professionals" under the Act, so the Board's rule either does not apply here, or must be read as a request to "limit the supervisory exception as applied to [health care workers]."

This Court recognized in *Yeshiva* that "[t]here may be some tension between the Act's exclusion of managerial employees and its inclusion of professionals, since most professionals in managerial positions continue to draw on their special skills and training." 444 U.S. at 686. The Court declined, however, to resolve that tension through adoption of the Board's "independent professional judgment" rule. Instead, the Court analyzed the facts as it

[42] In *Northcrest Nursing Home,* 313 NLRB No. 54 (1993), the Board asserts that all nurses will be supervisors if the Sixth Circuit's view in this case is upheld. This assertion is belied by the Board's own decisions issued prior to 1974. Before 1974, the Board generally applied the Act in accordance with the interpretation applied by the court of appeals in this case. *Id.* at 1 n.12. And under that rule, the Board did not find that all nurses were supervisors. *Compare Diversified Health Servs., Inc.,* 180 NLRB 461 (1969) (supervisory status not found) *with Garrard Convalescent Home, Inc.,* 199 NLRB 711, 717 (1972), discussed *supra* at n.37.

would for any other employee in any industry, even though the result in that case was to deny organizational rights to every single member of the Yeshiva faculty. The "controlling consideration" was the fact that the "faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial." 444 U.S. at 686.

This Court acknowledged in *Yeshiva* that the Act should not be interpreted in a way that would "sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them." 444 U.S. at 690. But here, as in *Yeshiva*, the rule advanced by the Board is not necessary to prevent that result.[43] Application of the requirements set forth in the language of the statute clearly prevents the wholesale exclusion of nurses and professionals, because mere authority to "direct" the actions of another employee in the course of performing professional duties is not itself sufficient to make someone a "supervisor." The statute requires that a supervisor have authority "*responsibly* to direct" some "other employees" in a manner that is not "routine." 29 U.S.C. 152(11) (emphasis added). In determining whether an employee's authority to direct others meets this standard, the Board and the courts consider a variety of factors, including whether the employee is the most senior management representative on site,[44] the ratio of supervisors to employees,[45] and the extent of the employee's responsibility to correct deficiencies in other employees' performance and to report those deficiencies to management.[46]

The Court's opinion in *Yeshiva* should not be read, as petitioner suggests, to approve the rule advanced by the Board in this case. Its rule does not protect just those "employees whose decisionmaking is limited to the *routine* discharge of professional duties and projects to which they have been assigned," *Yeshiva*, 444 U.S. at 690 (emphasis added), but instead protects *all nurses except those who exercise the power to discipline or promote*.[47] Pet. Br. at 20.

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[43] Not all nurses direct the work of less skilled employees, using independent judgment. Indeed, floor nurses in hospitals may have little or no responsibility over subordinates. *See Sherewood Enterprises, Inc.*, 175 NLRB 354 (1969); *Doctors' Hospital of Modesto, Inc.*, 183 NLRB 950 (1970). The Board itself has stated, "the duties and responsibilities given to licensed practical nurses vary considerably from one nursing home to another." National Labor Relations Board, *Thirty-Eighth Annual Report* at 65 (1973); *Park Manor Care Center, Inc.*, 305 NLRB No. 35 (1991). These differences highlight the need for a case by case determination.

[44] It has been observed that being the highest ranking employee at the facility is "[p]erhaps the most significant factor, often noted both in the decisions of the Courts and the Board" in determining supervisory status under the Act. *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062 (4th Cir. 1982). *See also American Diversified Foods, Inc.*, 640 F.2d 893, 896 (7th Cir. 1981); *Schnuck Markets, Inc. v. NLRB*, 961 F.2d 700, 706 (8th Cir. 1992); *Autumn Leaf Lodge*, 193 NLRB 638, 639 (1971); *Pine Manor Nursing Center*, 270 NLRB No. 145 (1984); *Wright Memorial Hosp.*, 255 NLRB 1319 (1981); *Northcrest Nursing Home*, 313 NLRB No. 54 at 9-10 (1993).

[45] The ratio of supervisory to non-supervisory employees is a "guiding light" in determining supervisory status. *Children's Habilitation Center, Inc. v. NLRB*, 887 F.2d 130, 132 (7th Cir. 1989); *see also Waverly-Cedar Falls Health Care Center, Inc. v. NLRB*, 933 F.2d 626, 630 (8th Cir. 1991); *NLRB v. Ajax Tool Works, Inc.*, 713 F.2d 1307, 1312 (7th Cir. 1983); *Southern Indiana Gas & Elec. Co. v. NLRB*, 657 F.2d 878, 885 (7th Cir. 1981); *James E. Matthews & Co. v. NLRB*, 354 F.2d 432, 435 (8th Cir.), *cert. denied* 384 U.S. 1002 (1966); *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076, 1080 (6th Cir. 1987); *see also Northcrest Nursing Home*, 313 NLRB No. 54 at 9-10 (1993).

[46] *See, e.g., Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir.), *cert. denied*, 338 U.S. 899 (1949); *NLRB v. Fullerton Publishing Co.*, 283 F.2d 545 (9th Cir. 1960), *see also* cases cited *infra* at n.55.

[47] The Court further suggested that professional employees may only be supervisors "if their activities fall outside the scope of . . . duties routinely performed by similarly situated professionals." 444 U.S. at 690. At least since its decision in *Beverly*, however, the Board has refused to find that nurses are supervisors even when the employer vests them with authority well beyond that inherent in their occupational status, as it did in this case. *See, e.g., Phelps Community Medical Center*, 295 NLRB 486 (1989); *Richland Manor*, 303 NLRB No. 20 (1991), *enf'd denied*, 970 F.2d 1548 (6th Cir.

Yeshiva suggests no such per se rule for professionals,[48] or for the health care industry.[49] This Court should accordingly find that the policies of the Act can be implemented by applying the same statutory criteria to all

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1992). Authority to assign aides to residents, to authorize work breaks, to report disciplinary problems, to adjust aides' complaints and to serve as the senior person in charge of 50 residents in a nursing home, is certainly not inherent in an employee's status as a nurse. The General Counsel in fact never sought to prove that these staff nurses did not exercise "any duties" beyond those "routinely performed" by nurses, 444 U.S. at 690, and the record refutes any such contention. *See* 3-9, *supra*. Petitioner's reliance on *Yeshiva* is accordingly misplaced.

[48] The cases cited by *Yeshiva* (444 U.S. at 690 n.30) in dicta as examples of an appropriate interpretation of the Act are analogous to decisions in nonprofessional contexts where employers are determined not to be supervisors because the direction they give is routine, infrequent, or sporadic. *See, e.g., NLRB v. Swift*, 292 F.2d 561, 563 (1st Cir. 1961); National Labor Relations Board, *Twenty-Sixth Annual Report* at 63 (1961). *See, General Dynamics Corp.*, 213 NLRB 851 (1974) (project leaders who direct other team members until the project is completed and then become rank-and-file employees are not supervisors); *Wurster, Bernardi & Emmons, Inc.*, 192 NLRB 1049 (1971) (architects who variously act as job captains or in other capacities for a particular job and who may give and receive direction from similarly situated professionals are not supervisors); *Skidmore, Owing & Merrill*, 192 NLRB 920 (1971) (same); *National Broadcasting Co.*, 160 NLRB 1440 (1966) (newsmen who rotate serving as deskmen and thus at different times direct each other are not supervisors).

[49] Petitioner relies heavily upon *Yeshiva*'s citation (444 U.S. at 690 n.30) of the Board's decision in *Doctors' Hospital of Modesto, Inc.*, 183 NLRB 950, 951-52 (1970), *enf'd*, 489 F.2d 772 (9th Cir. 1973) and its seeming approval (in dicta) of what it perceived to be the Board's approach in the "health-care context." *Id.* In *Modesto*, the Board rejected the employer's contention that all of the registered nurses in a hospital were supervisors. *Sherewood Entrprises, Inc.*, 175 NLRB 354 (1969), however, was a companion case in which the Board recognized that a number of the nurses in the same hospital *were* supervisors. The functions performed by the floor head nurses in *Sherewood* are almost identical to the functions performed by HCR's staff nurses.

employees alleged to be supervisors—just as Congress directed in the plain language of the statute.[50]

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT RESPONDENT'S STAFF NURSES ARE SUPERVISORS UNDER THE ACT

Petitioner asks this Court to find that respondent's staff nurses "do not possess supervisory authority under the Board's test." Pet. Br. at 31. Because that test "rest[s] on erroneous legal foundations," the Board's order in this case cannot be upheld. *Lechmere*, 112 S. Ct. at 849 (*quoting NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).[51] Applying the correct test, the court of appeals found that respondent's staff nurses are "indeed supervisors within the definition of Section 2(11)."[52] The record provides "no reason to reject this conclusion." *Yeshiva*, 444 U.S. at 691 (declining to disturb court of

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[50] Otherwise, acceptance of the Board's position "could result in the indiscriminate recharacterization as covered employees of professions working in supervisory and managerial capacities." *Yeshiva*, 444 U.S. at 688.

[51] Petitioner in fact does not ask this Court to uphold its order under any other interpretation of the statute. *See supra* n.25. And this Court cannot enforce the agency's decision by substituting what it considers to be a more adequate or proper basis. *See SEC v. Chenery Corp.*, 318 U.S. 80, 85 (1943).

[52] Even if this Court were to find that the Board's rule correctly interpreted "the interest of the employer," it should nevertheless affirm the decision of the court of appeals. Petitioner asserts that employees do not act in the "interest of the employer" when they exercise "professional" judgment, but the licensed practical nurses in this case are not "professionals," and there is no finding that they exercised professional judgment within the meaning of § 2(12). In point of fact, based upon extensive hearings, the Board has concluded that the duties of most LPNs in nursing homes are more similar to aides than RNs. *Park Manor Care Center, Inc.*, 305 NLRB No. 135 (1991). In addition, the nurses' responsibilities over the aides in this case did extend beyond matters incidental to patient care. *See* n.47, *supra*, and discussion at 4-9.

appeals' factual conclusions where contrary Board decision appeared to rest upon "conclusory rationales.")

1. The record establishes that HCR vests its staff nurses with authority "in the interest of the employer" to perform a variety of functions that are categorized as "supervisory" under Section 2(11), 29 U.S.C. 152(11), and that those functions are exercised with "independent judgment." The court of appeals based its decision on the authority of the staff nurses to "assign" and "responsibly to direct" the aides.[53] As the court of appeals found, the evidence on this issue is "clear," because these nurses in fact have authority to "direct[] the operation of the aides" and "the entire nursing home." Pet. App. 10a.

The staff nurses are responsible for assigning work to the aides, adjusting work loads depending upon the amount of staff present, transferring aides from one wing to another, scheduling breaks and lunch periods, requesting and approving overtime, signing time cards, allowing employees to leave early, and replacing aides who call in sick. *See* discussion, *supra,* at 5-6. The aides report directly to these nurses and follow their orders. Pet. App. 48a. The ALJ acknowledged that these nurses are required to "oversee the work of the aides," Pet. App. 36a, and that it is their responsibility to "criticize an aide for improperly performing a task." *Id.* at 40a. Moreover, the ALJ found that the nurses "routinely report problems about an aide's work or attendance to Heartland's administrator" and that the reports that they made would "[s]ometimes . . . have major consequences for an aide—as in the aide being fired or being advised that any further occurrence will result in discharge." *Id.* at 44a.

The record also shows that respondent's staff nurses are "in charge of a wing" for their entire shift. Pet. App. 48a. They are the "senior personnel" present on site

[53] The Court did not consider or resolve the other bases for finding supervisory status under this section. See n.21, *supra.*

during 75% of the facility's operating hours.[54] *Id.* at 46a. And if they are not supervisors, it would mean that respondent has structured its operations with a 30:1 ratio of employees to supervisors—an untenable conclusion. Pet. App. 47a. As the ALJ acknowledged, under "common parlance" (Pet. App. 48a), HCR's nurses are supervisors.

2. In *Yeshiva,* this Court found that the Board's order permitting the university's faculty to organize could not be upheld because a "straightforward application" of the statutory criteria applied in other industries required a contrary conclusion. 444 U.S. at 683. The same is true here. It is clear from the findings of the ALJ, and the Board's position before this Court, that respondent's nurses were denied supervisory status based solely upon the view that they did not possess the power to hire, discipline, or promote subordinate employees. Pet. App. 40a, 43a, 44a, 45a, 49a. But that is not a statutory prerequisite, and the court of appeals correctly determined that the staff nurses' authority to assign and responsibly direct met the statutory criteria when applied in the "straightforward" fashion used for other industries.[55] *Yeshiva,* 444 U.S. at

[54] Although the ALJ acknowledged that two staff nurses are in charge of the facility and its 100 residents 75% of the time, he said that "it certainly does not compel the conclusion that the nurses are supervisors" since the nurses can call the DON. Pet. App. 47a. It is, however, compelling evidence that the nurses have authority "responsibly to direct". *See* cases cited *supra* n.44, 45. The Board should not be permitted to ignore record evidence (*see Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951)), or the reality that HCR, "like most every business, has an established hierarchial structure," and that it is "standard procedure" for lower level supervisors to seek direction and keep superiors informed. *Maine Yankee Atomic Power Co. v. NLRB,* 624 F.2d 347, 363 (1st Cir. 1980); *see also, NLRB v. McCullough Envtl. Servs.,* 144 LRRM 2627, 2640-41 (5th Cir. 1993).

[55] *See Ohio Power Company, Inc. v. NLRB,* 176 F.2d 385 (6th Cir.), *cert. denied,* 338 U.S. 899 (1949); *American Diversified Foods, Inc. v. NLRB,* 640 F.2d 893 (7th Cir. 1981); *NLRB v. Pilot*

683. Any doubt about this conclusion is put to rest by the Board's decisions in *University Nursing Home, Inc.*, 168 NLRB 263 (1967), and *Avon Convalescent Center*, 200 NLRB 702, 706 (1972). *See* discussion *supra* at 35-37. In these decisions—which were issued when the Board was still applying the statutory criteria instead of its special "patient care" rule—the Board determined that nurses vested with no more authority than HCR's nurses were in fact supervisors.[56]

3. There can also be no question that the court of appeals correctly concluded that the policies of the Act would be undermined if HCR's staff nurses were not found to be supervisors. HCR's nursing home and its 100 residents are regularly left under the sole control of two staff nurses. HCR must accordingly vest those nurses with supervisory authority and rely upon them to exercise it. HCR requires the undivided loyalty of these nurses to ensure the quality, efficiency, and profitability of its facility.

Freight Carriers, Inc., 558 F.2d 205, 109 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978); *Dynamic Machine Co. v. NLRB*, 552 F.2d 1195 (7th Cir. 1977), *cert. denied*, 434 U.S. 827 (1978); *Fredericks Foodland, Inc.*, 247 NLRB No. 38 (1980); *Colorflo Decorator Products, Inc.*, 228 NLRB 408, 410 (1977).

[56] There is accordingly no basis to conclude, as petitioner suggests (Pet. Br. at 29-30), that these nurses only perform the functions of minor supervisors, such as straw bosses, who do not meet the statutory requirements. *See, e.g., Highland Superstores, Inc. v. NLRB*, 927 F.2d 918, 921 (6th Cir. 1991); *Colorflo Decorator Products*, 228 NLRB 408, 411 (1977); *Commercial Motors, Inc.*, 240 NLRB 288, 289 (1979); *United Elec. & Mechanical, Inc.*, 279 NLRB 208 (1986); *see also Avon Convalescent Center, Inc.*, 200 NLRB 702, 706 (1972).

CONCLUSION

For the reasons set forth, respondent respectfully requests this Court to affirm the judgment of the court of appeals.

Respectfully submitted,

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